

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 567 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?
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STATE OF GUJARAT

Versus

VAGHER KESHRI PETHA

Appearance:

MR SP DAVE ADDL.PUBLIC PROSECUTOR for Petitioner

MR YS LAKHANI for Respondent Nos. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 10/09/98

ORAL JUDGEMENT

1. Being aggrieved by the judgment and order dt. 19th May, 1997 passed by the then learned Judicial Magistrate (First Class) at Dwarka in Criminal Case No. 1455 of 1984 on his file acquitting the respondents of the offences punishable under Secs. 326-325-324-323 read with Secs. 120-B and Sec.114 of I.P.Code as well as Sec. 135(1) of the Bombay Police Act, the State has preferred this appeal.

2. The facts, leading the State to prefer this appeal may, in brief, be stated. Kantilal Vashram Joshi was at the relevant time serving as a Forest Officer at Dwarka. His immediate Head was Mr. C.B. Bhimani. Dharmendra, the friend of the respondent no.1 and

respondent no.3 were undertaking to carry out the works on contract basis, but as they were leaving the tender work half way or keeping it incomplete, and trickily recovering the amounts from the Forest Department, Kantilal Joshi was not happy because in that case ultimately he was likely to be held responsible and not any other officer in the Forest Department. As & when required, he was reprimanding censoring & castigating him for leaving the work half way. The respondents were not happy as Kantilal Joshi was keeping the watch and check them; with the result, they were not getting more amounts than the quantum of works done by them. They, therefore, conspired and decided to teach a lesson to Kantilal Joshi. As per the conspiracy, they planned to take Kantilal Joshi out at a farthest place and then assault him and cause hurt and do any other wrongs that could conveniently & secretly be done. As per that conspiracy, on 3rd April, 1984 at about 4-30 p.m. taking motor cycle, the respondent no.3 and Harshadbhai Odhavji Mehta who is referred to by the witnesses as Mahetabhai in evidence, went to Kantibhai Vashrambhai Joshi. With some hesitation & reluctance, Kantibhai Joshi agreed to go with them & went with the respondent no.3 and Harshadbhai Mehta. All the three then left riding over the motor cycle. As per the plan, both took Kantibhai Vashrambhai Joshi to the Cinema house to see movie, and after the show was over, they left for Dwarka. At that time, it was 9-30 p.m. Narendrabhai wanted to pass water but the respondent no.3 did not pay any heed and did not stop the motor cycle at that place. As per the conspiracy, when they reached between Mojab and Makanpur villages, the respondent no.3 stopped the motor cycle and parked it off the road under the guise that clutch wire of the motor cycle was not working properly, and it was difficult for him to drive the motor cycle. Kantibhai Joshi, alighting from the motor cycle, went at a distance so as to make-water. At that time, two persons, later on came to be known as the respondent nos. 1 and 2, armed with sticks, assaulted and showering stick-blows, caused simple as well as grievous injuries to Kantilal Joshi. He sustained fractures on right leg, right hand, left shoulder and on the back. He, rushing towards Kantibhai Joshi sought help, but instead of saving, Kantibhai Joshi, the respondent no.3 canted, and then both the respondent no. 3 and Harshadbhai Mehta, riding over the motor cycle, fled. As it was the night time, & place being desolate, no body could rush there to help. With difficulty, he walked a little distance, scrabbled and crawled. He then being bucked against & flagged, fell down on the road. At that time, some one was passing by a truck. He saw Kantibhai Joshi lying helpless on the

road. He took him to the hospital, where Kantilal was treated. The Police was informed by the Doctor. Kantibhai Joshi then lodged the complaint. The Police, after investigation was over, filed the chargesheet against the respondents and one Patel Chhaganbhai Bhagwanbhai who came to be discharged later on, as the Police had not made out any case against him to proceed with. The case then proceeded against the present respondents. The case was registered as Criminal Case No.1455 of 1984. The learned Judge framed the charge at Ex.26 to which the respondents pleaded not guilty. Necessary evidence was adduced by the present appellants. Appreciating the evidence before him, the then learned Judicial Magistrate (First Class) found that the prosecution had failed to establish the charge framed against the respondents accused beyond reasonable doubt. He, therefore, acquitted the respondents. Consequently, the present appeal is filed by the State.

3. Assailing the legality and validity of the judgment and order of acquittal passed by the learned Magistrate, Mr. S.P.Dave, the learned APP contends that the learned Magistrate has fallen into error in not correctly appreciating the evidence led before him; appreciation of the evidence is wholly against the sound principles of law and the same being arbitrary, capricious and perverse, this Court may interfere with the order of acquittal passed and upsetting the same, may convict and sentence the respondents, coming down heavily upon them, because according to Mr. Dave, when a Government servant discharging his duties honestly, is not only treacherously made to leave his house but by assault, brutally beaten also for teaching him a lesson, for being honest, the wrong doers cannot leniently be dealt with.

4. No doubt, as submitted, no leniency can be shown to the wrong doer. But if the charge is proved, the wrong doer can be convicted, and sentence can be inflicted commensurating with the wrong done. Before it can be done, it should be seen whether the evidence on record is sufficient to hold the accused guilty.

5. It may be stated that I have with care and caution gone through the judgment delivered by the learned J.M.F.C., and I am in general agreement with his reasonings and conclusions. When that is so, it is not necessary for me to restate his reasonings. However in short, I will deal with two points going to the root of the case.

6. On the question of identification, the prosecution has to retreat. Admittedly, the incident happened at 21-45 hrs. It happened on the road between two villages, where there was no light and it was difficult at that time to see who it was. When that is so, it was incumbent upon the prosecution making it clear how the witnesses could see the assailants and knew them. At the time of incident, Harshadbhai Odhavbhai Mehta was present because he accompanied the victim Kantilal Joshi, and secondly Kantibhai Joshi himself is the person who can identify the assailants. No doubt, Kantilal Vashram Joshi (Ex.32) in his evidence tries to rope in all the three respondents, but his evidence is rightly discarded by the learned Magistrate. When the statement was recorded, Kantilal did not give the names of the assailants. He simply stated that two persons had assaulted from his back. When the Executive Magistrate, on 4/4/1984 recorded his Dying Declaration, he, in answer to the material questions, stated that he could not recognize any of the assailants, because it was a night time. At the first point of time, soon after the incident when occasion arose to state about the incident, the victim when does not rope in the respondents giving their names, but later on, he tries to rope in few days after his statement is recorded, it can safely be said that few days after the incident, when his statement was again recorded, he got time to think and make out a case so as to rope in the respondents, may be because he was feeling mortified as respondents used to get their bills sanctioned by one or another gadget. Such conclusion has also further strengthened, when the evidence of Harshadbhai Odhavbhai Mehta, the eye-witness is perused. His evidence is recorded at Ex.50. From his evidence, it appears that it was too dark to see who it was and hence he could not recognize any of the assailants. When the respondents who were sitting in the Court were pointed out, he has clearly stated that he was not knowing any of those persons, and further made it clear that those respondents were neither there, nor they caused injury to Kantibhai Joshi. Jivanlal Valji is examined at Ex.30 whose evidence may be referred to at this stage. He was going by the way taking his truck some times after the incident was over. He could recognize Kantibhai Joshi lying on the road and groaning. He could see that Kantibhai Joshi was seriously injured and had sustained bleeding injuries. On being questioned by him, Kantibhai Joshi replied that some one had gone to him to beat ; but he did not state who those assailants were ? If at all, he had known the assailants, certainly he would have stated the names of those assailants to Jivanlal Valji. Such shaky evidence on record on the point of

identification in clear terms goes to show that the prosecution has failed to establish that the respondents were the assailants and they have committed the wrongs alleged.

6. I will now switch over to the next point. While cross-examining the witnesses of the prosecution, on behalf of the respondents, certain contradictions putting necessary questions were brought on record. It is pertinent to note that the Investigating Officer who recorded the statements of the witnesses, is not examined and no reason is assigned for such omission. If the prosecution fails to examine the material witness, for no good cause, it would be a circumstance on record going to discredit the truth of its case. In this case, when the Investigating Officer is not examined, the respondents did not get the chance to prove the discrepancies or contradictions, they wanted to show to the Court. In this case, therefore, it can be said that the respondents did not get proper opportunity to put their case before the Court. For want of such evidence & opportunity, if finding is given against them, it would tantamount to condemning them unheard. On query qua both the points hereinabove discussed, Mr. S.P.Dave, the learned APP tried his best to convince me how those points would not be the impediment in the way of the prosecution, but failed to convince me pointing any thing cogent either on fact or on law on record, so as to take a different view than what I have hereinabove taken. On no other points, the submissions are made.

7. For the aforesaid reasons, there is no justifiable reason to upset the order of acquittal. The learned Magistrate is perfectly right in acquitting the respondents. The appeal, therefore, being devoid of merits, is required to be dismissed and is accordingly dismissed.

Date: 10/9/1998. -----
(ccshah)